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No. 01-929

In The

Supreme Court of the United States

DAIMLERCHRYSLER AKTIENGESELLSCHAFT,

Petitioner,

v.

SCOTT OLSON, Individually and as Independent Executor of the Estate of Karen L. Olson, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Texas Court Of Appeals, Third District

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 1257 provides jurisdiction over either:

   a. the decision of a Texas intermediate court of appeals in an interlocutory proceeding when the entire case remains pending in the trial court and the federal question addressed by the intermediate court remains open for further consideration, development, and review in the Texas state courts, or

   b. the state court's denial of a mandamus petition when that denial did not end the litigation nor address the federal issues, which remain to be litigated at trial and appealed following a final judgment.

2. Whether, on the particular factual record of this case, the Texas court's exercise of personal jurisdiction over Daimler-Benz Aktiengesellschaft comports with the Due Process Clause.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The respondents, Scott Olson, Individually and as Independent Executor of the Estate of Karen L. Olson, and Vickie Olson, respectfully oppose the petition for a writ of certiorari filed by DaimlerChrysler.[1]

JURISDICTION

Neither the Texas Supreme Court's dismissal for want of jurisdiction of Daimler-Benz's petition for review in the underlying interlocutory appeal, nor the Texas Supreme Court's denial of Daimler-Benz's petition for writ of mandamus, qualifies as a final judgment under 28 U.S.C. § 1257(a). *See* pp. 4-9, below. Consequently, this Court lacks jurisdiction.

STATEMENT

The respondents disagree with many of the petitioner's factual assertions. These factual disputes are important because, under Texas law, Daimler-Benz bore the burden of negating every possible basis for personal jurisdiction. *CSR Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex.

[1] Never before has DaimlerChrysler AG been a party to this case. Below, the appellant was Daimler-Benz AG, and as late as the year 2001, Daimler-Benz AG was still filing briefs in the Texas Supreme Court. *But see* Pet. 1 & n.1 (asserting Daimler-Benz AG ceased to exist in 1998).

1996); *see* Pet. App. 5a ("A defendant who challenges a court's exercise of personal jurisdiction . . . carries the burden of negating all bases of personal jurisdiction."). Daimler-Benz has never challenged the constitutionality of this Texas procedural device, and consequently, the court of appeals reviewed all the evidence in the record to determine whether Daimler-Benz had carried its burden. Pet. App. 6a; *Ames v. Ames*, 776 S.W.2d 154, 158-59 (Tex. 1989).

Moreover, because Daimler-Benz requested no fact findings from the trial court, "all questions of fact will be presumed and found in support of the judgment." *Zac Smith & Co. v. Otis Elevator Co.*, 734 S.W.2d 662, 666 (Tex. 1987); *see* Pet. App. 6a. A Texas appellate court may set aside the presumed or implied findings "only if [they are] so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust." Pet. App. 6a; *see In re King's Estate*, 244 S.W.2d 660, 661 (Tex. 1951). "If evidence supports the implied findings of fact, [the court] must uphold the trial court's judgment on any legal theory supported by the findings." Pet. App. 6a-7a (citing authorities).

While it repeatedly asserts that various "facts" are stipulated or uncontroverted, Daimler-Benz ignores the contrary evidence in the record; in so doing, it ignores the governing standards of review employed by the Texas state courts. As discussed below, many significant factual disputes exist. Under unchallenged Texas procedure, those historical facts are resolved in favor of the trial court's exercise of jurisdiction over Daimler-Benz.

REASONS THE PETITION SHOULD NOT BE GRANTED

There are many reasons this Court should not grant the petition. Most notably, the Court lacks jurisdiction – at this point in the proceedings – to review the state court's decision. Even if the jurisdictional obstacle could be overcome, however, this case does not present an effective vehicle for reaching most of the legal issues Daimler-Benz believes warrant review. Not only do significant factual disputes exist, but Daimler-Benz failed to raise in the courts below many of the federal issues it asks this Court to consider. It is for this reason that many, if not all, of Daimler-Benz's asserted conflicts are completely unaddressed by the courts below. The consequence is two-fold: *first*, the Texas courts have not yet had an opportunity to address the issues raised by Daimler-Benz, and *second*, this Court cannot divine how Texas might resolve these issues when they are properly raised after a final judgment.

Daimler-Benz informs this Court that *in personam* jurisdiction "has 'become one of the most litigated issues in state and federal courts.' " Pet. 8 (quoting Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531, 531 & n.5 (1975)). Accepting the ubiquitous nature of these issues, they will return, and this Court will have numerous opportunities to address them. The Court should await a better vehicle than this case, which is cluttered with obstacles to reaching the issues that Daimler-Benz advances.

I.

A. The Decision Below Is Interlocutory and Subject to Further Review in Texas.

"This case, still *sub judice* in [Texas], was brought to this Court too soon." *Jefferson v. City of Tarrant*, 522 U.S. 75, 77 (1997). The relevant statute, 28 U.S.C. § 1257(a), authorizes this Court to review only "*final* judgments or decrees rendered by the highest court of a state in which a decision could be had. . . . " (emphasis added). To be "final" for purposes of section 1257(a), the state court judgment must meet two criteria: first, it "must be subject to no further review or correction in any other state tribunal," and second, "it must also be final as an effective determination of the litigation and not merely interlocutory or intermediate steps therein." *Jefferson*, 522 U.S. at 81 (quoting *Market Street R. Co. v. Railroad Comm'n*, 324 U.S. 548, 551 (1945)). "It must be the final word of a final court." *Id.*

Neither the Texas Supreme Court's dismissal for want of jurisdiction of a petition for review in an interlocutory appeal, nor the court of appeals' decision in that interlocutory appeal, is a "final judgment" within the meaning of section 1257(a).

First, the decision is undeniably interlocutory. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(7) (Vernon Supp. 2002) (authorizing interlocutory appeal of an order that "grants or denies the special appearance of a defendant"). As Daimler-Benz concedes, the intermediate state court's decision has not terminated the litigation. *See* Pet. 1. To the contrary, the entire case – all claims and all

parties – remains pending in the state district court, awaiting trial on the merits.

Second, the state courts may review again the federal questions presented. Under Texas law, the trial court itself can reconsider its interlocutory personal-jurisdiction decision at any time before it renders a final judgment. *See* TEX. R. APP. P. 29.5 (Vernon Supp. 2001) ("While an appeal from an interlocutory order is pending, the trial court retains jurisdiction of the case and may make further orders, including one dissolving the order appealed from. . . . "); *Houston Health Clubs, Inc. v. First Court of Appeals*, 722 S.W.2d 692, 693-94 (Tex. 1986) (trial court retains jurisdiction to set aside an interlocutory decision at any time before final judgment). In fact, Texas trial courts have reversed jurisdictional rulings after trial. *E.g., 3-D Elec. Co. v. Barnett Constr. Co.*, 706 S.W.2d 135, 137 (Tex. App. – Dallas 1986, writ ref'd n.r.e.). Regardless of whether the trial court revisits its own order, the personal jurisdiction ruling will be subject to further review on appeal after the trial on the merits. *See Deloitte & Touche, L.L.P. v. Fourteenth Court of Appeals*, 951 S.W.2d 394, 397 (Tex. 1997) (recognizing a litigant's right to pursue a statutorily-authorized interlocutory appeal and thereafter to raise the same issue in an appeal after the trial on the merits).

Precisely because Daimler-Benz's appeal is interlocutory, the Texas Supreme Court has had no opportunity to review the trial court's jurisdictional ruling and no opportunity to consider Daimler-Benz's arguments. Absent very limited exceptions not present here, the state supreme court has no jurisdiction to review interlocutory

orders. *See* Pet. App. 33a (supreme court's order dismissing petition for review "for want of jurisdiction"); *Gonzalez v. Avalos*, 907 S.W.2d 443, 443-44 (Tex. 1995) (explaining limited jurisdiction state legislature has allowed supreme court in interlocutory appeals). Because it lacks jurisdiction over interlocutory appeals, the Texas Supreme Court routinely dismisses interlocutory appeals from special appearance rulings "for want of jurisdiction." *E.g., Jones v. Beech Aircraft Corp.*, 995 S.W.2d 767 (Tex. App. – San Antonio 1999), *pet. dism'd w.o.j.*, 43 TEX. SUP. CT. J. 155 (Dec. 9, 1999); *E.I. DuPont de Nemours v. Bailey*, 986 S.W.2d 82 (Tex. App. – Beaumont 1999), *pet. dism'd w.o.j.*, 43 TEX. SUP. CT. J. 337 (Jan. 27, 2000); *Happy Indus. Corp. v. American Specialties, Inc.*, 983 S.W.2d 844 (Tex. App. – Corpus Christi 1998), *pet. dism'd w.o.j.*, 42 TEX. SUP. CT. J. 560 (April 22, 1999); *Disney Enter., Inc. v. Esprit Finance, Inc.*, 981 S.W.2d 25 (Tex. App. – San Antonio 1998), *pet. dism'd w.o.j.*, 42 TEX. SUP. CT. J. 304 (Jan. 7, 1999). After a final judgment, however, the Texas Supreme Court will have jurisdiction to review the personal jurisdiction issue raised by Daimler-Benz. *See* TEX. GOV'T CODE ANN. § 22.001 (Vernon 1988) (setting forth the supreme court's jurisdiction in cases "brought to the courts of appeals from appealable judgments of trial courts" as opposed to interlocutory decisions); *Deloitte & Touche*, 951 S.W.2d at 397.

Quite simply, this case has none of the requisites of finality necessary to provide jurisdiction under 28 U.S.C. § 1257(a). While this Court in certain circumstances has "treated state-court judgments as final for jurisdictional purposes although there were further proceedings to take place in the state court," *Florida v. Thomas*, 532 U.S. 774,

___, 121 S. Ct. 1905, 1908-09 (2001) (quoting *Flynt v. Ohio*, 451 U.S. 619, 620-21 (1981)), this case falls within none of the recognized exceptions because the federal issue never has been "finally decided by the highest court in the state." *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975); *see also id.* at 479-84 (explaining the four categories of exceptions). The Texas Supreme Court has not yet reviewed the federal issues presented by Daimler-Benz; the federal issues remain open for development, decision, and review by Texas courts at all levels; and the state's highest court will have its first opportunity to consider the issues raised by Daimler-Benz only following a final judgment.

Accordingly, Daimler-Benz is incorrect to state that "this Court has repeatedly exercised review in 'cases presenting jurisdictional issues in this posture.' " Pet. 1 (quoting *Calder v. Jones*, 465 U.S. 783, 788 n.8 (1984)). In *Calder*, this Court wrote: "Although there has not yet been a trial on the merits in this case, the judgment of the California appellate court 'is plainly final on the federal issue and is not subject to further review in the state courts.' " *Calder*, 465 U.S. at 788 n.8 (quoting *Cox Broadcasting*, 420 U.S. at 485). It is only in "cases presenting jurisdictional issues in *this* posture" that the Court has concluded the jurisdictional issue was final. *Calder*, 465 U.S. at 788 n.8 (emphasis added). This case, however, is not in that posture. Here, the decision of the Texas court of appeals in this interlocutory proceeding is not final on the federal issues; to the contrary, the federal issues are subject to further review in the state courts. This Court should await the decision of the state's highest court – a decision that can come only after a final judgment.

B. Mandamus Provides Daimler-Benz With No Basis to Assert Jurisdiction.

Mandamus is no salvation for Daimler-Benz's jurisdictional shortcomings. Although the denial of an original proceeding sometimes may qualify as a "final judgment," that is not true in this case. The Texas Supreme Court's denial of mandamus has not ended the litigation. Moreover, it did not even address, much less conclusively resolve, the federal constitutional issues which remain to be fully litigated at trial and appealed following a final judgment. Thus, it is not "final" in any real sense, and certainly not in the sense that this Court has interpreted 28 U.S.C. § 1257(a).

Furthermore, adequate and independent state grounds prevent this Court from reaching the federal constitutional questions, because the Texas Supreme Court denied the petition for writ of mandamus without opinion. Under these circumstances, this Court presumes that review of any federal question was denied on the basis of adequate and independent state grounds, if any exist. *See Adams v. Robertson*, 520 U.S. 83, 86 (1997) ("When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented. . . . "); *Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978) ("Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule."). That rule applies here.

Texas follows a strict procedural rule that mandamus will not issue when there is "a clear and adequate remedy

at law, such as a normal appeal." *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). When an appellate remedy exists, it precludes mandamus review of interlocutory orders. *See, e.g., Deloitte & Touche*, 951 S.W.2d at 396-97 (denying mandamus relief in part because "Deloitte & Touche has a remedy by appeal," both "an interlocutory appeal . . . [and a later appeal] after a trial on the merits"). Thus, this Court must presume that the mandamus petition was denied on adequate and independent state grounds completely separable from the federal constitutional questions. Lacking jurisdiction, the Court should dismiss or deny the petition.

II.

A. This Court Should Await a Final Decision by the Texas Courts.

Even if the court of appeals' decision could be considered a final judgment, this Court should deny the petition given the procedural posture of the case. This is the decision of a single intermediate state court of appeals in an interlocutory proceeding. The decision has not yet been considered by the Texas Supreme Court; that court will have its first opportunity to review the jurisdictional issue in the ordinary course of an appeal following a trial on the merits.

Precisely because this personal-jurisdiction ruling is open for reconsideration, it cannot form a basis for issue preclusion in any other case. *See, e.g., In re Gober*, 100 F.3d 1195, 1201 (5th Cir. 1996) (recognizing that under Texas law, "interlocutory orders are not entitled to preclusive effect"). Daimler-Benz itself has pointed out that at least

one other Texas state trial court has refused to subject it to general jurisdiction. *See* Petitioner's Mot. for Reh'g of Dismissal for Want of Jurisdiction, p. 12 & Ex A (noting that a state court district judge "presented with the same arguments as [the Olsons] advance here" concluded that Daimler-Benz "lacks the continuous and systematic contacts necessary for a finding of general jurisdiction").

Furthermore, the Texas Supreme Court has agreed to hear two cases involving similar issues. *See BMC Software Belgium, N.V. v. Marchard*, 44 TEX. SUP. CT. J. 577, 578 (April 7, 2001) (listing issues presented); *American Type Culture Collection, Inc. v. Coleman*, 45 TEX. SUP. CT. J. 107, 114 (November 17, 2001) (same). Once decided, these cases may affect petitioner's arguments, and that is a further reason why this Court should not review the interlocutory decision now. Because it cannot yet be said what position Texas ultimately will take on Daimler-Benz's special appearance, or what position Texas will take on the questions raised generally, the Texas state courts should be allowed finally to resolve the jurisdictional questions raised by Daimler-Benz before this Court exercises its review powers.

B. Factual Disputes Will Hamper this Court In Reaching the Legal Issues.

We dispute many of Daimler-Benz's factual assertions. Although it repeatedly asserts that various facts are stipulated or uncontroverted, Daimler-Benz ignores the contrary evidence. Far from "uncontroverted," many of

the underlying facts are disputed, and this Court will struggle with those disputes should it grant certiorari.

For example, the petition asserts that "Daimler-Benz AG submitted uncontroverted evidence that it had 'never participated in the day-to-day conduct of MBNA's business,' the parent and indirect subsidiary had their own 'offices and directors' as well as 'separate corporate existences,' and these 'distinct and separate existences' had 'always been formally maintained, exercised, and observed in all respects.' " Pet. 5. The respondents do not agree that this evidence is "uncontroverted." As the Texas court of appeals recognized, Daimler-Benz "drafted decisions for the 'internal bodies' [of its subsidiaries];" Daimler-Benz "exercise[d] significant functions for MBNA . . . such as obtaining financing and coordinating purchasing;" Daimler-Benz "closely supervises and directs the activities of its subsidiaries;" the "profits earned by subsidiaries of Daimler-Benz are added to consolidated retained earnings;" Daimler-Benz's subsidiaries "contribute remuneration each year to the members of Daimler-Benz's Board of Management;" Daimler-Benz "followed and assessed ongoing projects of subsidiary companies;" and Daimler-Benz has "the right, in a number of situations, to determine the details of MBNA's daily operations." *See* Pet. App. 20a-21a. There is more such evidence in the record, but as even these limited quotations prove, the evidence of Daimler-Benz's control over MBNA is disputed.

We also dispute Daimler-Benz's assertion that "[u]nder the distribution agreement, MBNA selected models and parts it wished to distribute in the United States; purchased them in Germany, and then imported

them into this country, using its own facilities." Pet. 4. Under the distribution agreement, "Daimler-Benz has the right to determine, together with MBNA, purchase figures and planning schedules; if the parties cannot agree, the figures determined by Daimler-Benz apply. If the parties cannot agree on the minimum quantity of vehicles MBNA must keep in stock, Daimler-Benz can determine the minimum quantity. Likewise, in the absence of agreement, Daimler-Benz determines the number and assortment of demonstration vehicles MBNA must keep in stock." Pet. App. 21a. Thus, MBNA did not freely select the models and parts it wished to distribute.

Likewise, it is disputed whether Daimler-Benz always relinquishes title to its automobiles in Germany. Official shipping documents submitted to the U.S. Customs Service list Mercedes-Benz vehicles that arrived at the Port of Houston between 1987 and 1990. CR 1200-06. These records identified the shipper as "Daimler-Benz" – *not* MBNA. CR 1198-1206; 1215-99. The parties dispute the significance of Daimler-Benz's identification as the "shipper," and that is yet another factual dispute this Court will confront if it grants certiorari.

Daimler-Benz also states that the "parties stipulated that Daimler-Benz AG never advertised the sale of Mercedes-Benz vehicles in Texas or the United States; such advertising was conducted only by MBNA and its local dealers." Pet. 4-5. Although the parties originally stipulated to these facts, that stipulation was contradicted by other evidence. And, as the court of appeals pointed out, Daimler-Benz failed to object to the contrary evidence. Pet. App. 12a-13a, 24a, 25a n.6. As a consequence, the stipulations are not conclusive; they are "merely some

evidence for the fact finder to consider." Pet. App. 13a. Specifically, the respondents offered evidence of Daimler-Benz's admission that "it has spent large sums of money to advertise its trademarks and service marks [in Texas]." *Id.* This admission controverted the stipulation and supported the trial court's jurisdictional ruling. *Id.*

This Court may decide the ultimate legal significance of the facts when an issue – such as whether punitive damages are excessive – "'calls for the application of a constitutional standard to the facts of a particular case.' " *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, ___, 121 S. Ct. 1678, 1685 (2001) (quoting *United States v. Bakakajian*, 524 U.S. 321, 336-37 n.10 (1998)). "Having said this, we hasten to point out that a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges." *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *Cooper Indus.*, 532 U.S. at ___, 129 S.Ct. at 1685-88 & n.14. Under Texas procedure, the historical facts were found in favor of the respondents, *Zac Smith & Co. v. Otis Elevator Co.*, 734 S.W.2d 662, 666 (Tex. 1987), and those facts could not be disregarded unless they were "so against the great weight and preponderance of the evidence as to be manifestly erroneous or unjust." *In re King's Estate*, 244 S.W.2d 660, 661 (Tex. 1951). Thus, this case is a poor vehicle for reaching any federal issues, because the constitutional questions depend on historical facts that are disputed.

C. The Stream of Commerce Issue Is Not Fully Developed or Presented.

The petition criticizes the court of appeals for relying "on Daimler-Benz AG's placement of 'a large volume of vehicles into a stream of commerce destined for the United States' " and accuses the court of appeals of creating a conflict "with a line of cases holding that the 'stream of commerce' theory is a basis for specific jurisdiction," not general jurisdiction. Pet. 12 (quoting the court of appeals, Pet. App. 27a). There is no denying that Daimler-Benz designs, manufactures, sells, and ships huge numbers of cars destined for Texas. Those facts are disclosed in the record, CR 1198-1206, and Daimler-Benz has stipulated that it "does design, manufacture, and sell vehicles in a stream of commerce intended for the U.S. market, including the state of Texas." Pet. App. 53a.

Nonetheless, the court of appeals did *not* hold that Daimler-Benz is subject to general jurisdiction based upon the stream of commerce doctrine. The court of appeals' discussion of Daimler-Benz's "Minimum Contacts" with the state of Texas is reproduced at pages 10a-26a of the petitioner's appendix. On page 11a, in a series of paragraphs setting out the parties' stipulations, the court of appeals recites that "Daimler-Benz does, however, design, manufacture, and sell vehicles in a stream of commerce intended for the U.S. market, including the state of Texas." Thereafter, the court makes no further mention of this fact in the entirety of its minimum contacts analysis. *See* Pet. App. 12a-26a. Instead, the court focuses on four topics: (1) Daimler-Benz's Federal-Court

Petition; (2) Judicial Admissions; (3) Alter Ego; and (4) Internet Website with E-mail. *Id.* After discussing these categories of contacts, none of which mentions Daimler-Benz's creation of a stream of commerce directed at the Port of Houston, the court concludes that Daimler-Benz "is subject to general jurisdiction," and consequently, that the court "need not consider whether specific jurisdiction exists." *Id.* at 26a.

Fairly read, the court of appeals' opinion does not rely on the stream of commerce theory. The court does not discuss or give weight to the stream of commerce created by Daimler-Benz because it finds no need to "consider whether specific jurisdiction exists." *Id.* The court's opinion does not create a conflict with any of the cases cited by Daimler-Benz.

The one other place the court of appeals mentions "that Daimler-Benz places a large volume of vehicles into a stream of commerce destined for the United States" is in the court's discussion of "Fair Play and Substantial Justice." *Id.* at 27a. Daimler-Benz does not attempt to show that this statement creates or exacerbates a conflict among the courts, or even that it is error.

Because the court of appeals' analysis does not rest on the stream of commerce paradigm, this case does not present an effective vehicle for revisiting any federal issues involving the stream of commerce doctrine.

D. The *Zippo* Test for Internet Contacts Was Invited Below by Petitioner.

Daimler-Benz says that this case provides an "excellent vehicle" for resolving the conflict over the framework for analyzing Internet contacts put forward in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (W.D. Pa. 1997). *See* Pet. 15-17. However, Daimler-Benz never raised this issue below. To the contrary – it *embraced* the *Zippo* framework in the trial and appellate courts, telling the court of appeals that "[t]he analytical framework for evaluating the jurisdictional significance of operating a website was summarized by the court in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*" *See* Brief of Appellant, p. 26. Daimler-Benz never suggested that some other framework should be used, and Daimler-Benz did not disclose the conflict that it now raises or ask the court of appeals to consider it.

Under Texas law, Daimler-Benz's acquiescence in the trial and appellate courts' use of the *Zippo* analysis waives its right to complain of that legal analysis. *See, e.g., Dallas County v. Sweitzer*, 881 S.W.2d 757, 770 (Tex. App. – Dallas 1994, writ denied) ("A party cannot complain on appeal of action which he induced or allowed."). Furthermore, Daimler-Benz's failure to have raised or briefed the issues in the lower appellate court is an independent waiver of its right to complain. *See, e.g., Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993) ("We have held repeatedly that the courts of appeals may not reverse the judgment of a trial court for a reason not raised in a point of error."). Because these Texas procedural rules barred Daimler-Benz from raising this issue in the lower courts,

Daimler-Benz should not be allowed to raise this issue for the first time in this Court. *See Michigan v. Tyler*, 436 U.S. 499, 512 n.7 (1978) (explaining that state supreme court had refused to consider an argument not raised in the courts below and concluding that "[f]ailure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court").

Undoubtedly Daimler-Benz will argue that its failure to raise these issues below does not preclude this Court from exercising jurisdiction because "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed." *See Illinois v. Gates*, 462 U.S. 213, 220 (1983) (quoting *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899)). Even if Daimler-Benz can raise these issues for the first time in this Court, however, the fact that it has waited creates significant review problems.

First, because the petitioners invited the court of appeals to use the *Zippo* framework, there has never been "any real contest at any stage of this case upon the point." *Id.* at 222 (quoting *Morrison v. Watson*, 154 U.S. 111, 115 (1894)). Even now, Daimler-Benz still has not taken a position on what test *should* be applied to measure a party's Internet contacts. Obliquely, Daimler-Benz merely asserts that a conflict exists; it takes no position on how any conflict should be resolved.

Quite simply, the viability of *Zippo* and alternative approaches has not been developed below. Whether Daimler-Benz and respondents will even clash on the issue is unknown. If, as Daimler-Benz asserts, "[t]he

question of how websites should be treated in the due process analysis . . . arises with great regularity," Pet. 17, this Court should grant review only when the question has been developed, the litigants have taken positions, and the lower courts have actually considered them.

Second, because the question was not raised in the lower courts, the record is not fully developed. As this Court has recognized, "questions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind." *Id.* at 221 (quoting *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969)). Here, the record remains open. Daimler-Benz is free to urge the lower courts – starting with the trial court – to analyze its Internet contacts under any framework it desires. Then the parties can develop an appropriate record. With a full record, this Court will have a better means to review this question.

Daimler-Benz also asserts that the court of appeals' decision conflicts "with how other courts have *interpreted* the *Zippo* framework." Pet. 17 (emphasis original). The one case Daimler-Benz cites in support of this statement is *Mink v. AAAA Development LLC*, 190 F.3d 333 (5th Cir. 1999). Pet. 17. Far from creating intolerable conflicts, Pet. 9, the Fifth Circuit actually adopted the *Zippo* analysis. *See Mink*, 190 F.3d at 336 ("We find that the reasoning of *Zippo* is persuasive and adopt it in this Circuit."). Thus, to the extent the court of appeals "adopted" the *Zippo* analysis, it is in line with the Fifth Circuit. Nothing more is presented but a complaint that the Texas court of appeals did not correctly apply particular facts to its announced legal standard.

Moreover, the *Mink* court addressed a situation in which the defendant operated an Internet website, but had no other contacts within the forum of any kind. *See Mink*, 190 F.3d at 336. In this factual context, the court concluded that "the presence of an electronic mail access, a printable order form, and a toll-free phone number on a website, *without more*, is insufficient to establish personal jurisdiction." *Id.* at 337 (emphasis added). That conclusion in no way conflicts with the court of appeals' conclusion here that the "level of interactivity [of Daimler-Benz's website] standing alone might not be enough to subject Daimler-Benz to jurisdiction in Texas." Pet. App. 25a. Merely to consider Daimler-Benz's website "a factor, along with the other contacts that exist in this case," *id.*, is not in conflict with *Mink*. The court of appeals' website analysis is limited and case-specific; it provides a poor vehicle for examining Internet contacts in general.

E. The Admissions Daimler-Benz Made About Its Trademarks Do Not Present Significant Issues for Review.

The lower court did not subvert federal trademark protections. The court of appeals did not rely merely "on the filing by Daimler-Benz AG and MBNA of an unrelated trademark infringement complaint in federal court in Texas," Pet. 26, nor was it "the court's view that licensing a trademark to business partners in a state, and manufacturing goods bearing that trademark that are later sold within that state, is tantamount to conducting direct advertising in the forum." Pet. 17. Instead, the court of appeals relied upon the unequivocal admissions

that Daimler-Benz chose to make in its federal lawsuit. *See* Pet. App. 12a-16a.

In paragraph nine of its complaint, Daimler-Benz described its own usage of its trademarks in Texas:

> Daimler-Benz has continuously used [its registered] trademarks and service marks [including the name "Mercedes-Benz" and the three-pointed star symbol] throughout the State of Texas and the United States since long prior to the acts complained of herein, and for many decades, to identify and distinguish its automobiles, their parts, accessories and related products, as well as the maintenance, repair and related services furnished by or through its authorized and licensed distributors and dealers.

Pet. App. 64a-65a. Paragraph ten then alleged that MBNA, the exclusive distributor of Mercedes-Benz vehicles in the United States, had also "continuously used said trademarks and service marks . . . since at least 1965, for the same purposes as Daimler-Benz." *Id.* at 65a. In a separate paragraph, Daimler-Benz stated that both Daimler-Benz and MBNA had "expended considerable sums of money using, promoting and advertising said marks" with the result that Daimler-Benz's marks "are among the most famous and distinctive marks throughout the United States and the world, including the State of Texas." *Id.* By making these judicial admissions about its intellectual property rights, which it said had been repeatedly used "in commerce" in Texas, Daimler-Benz

admitted that it has directed its commercial efforts towards Texas on a systematic and widespread basis.

The court of appeals concluded that Daimler-Benz was bound by those allegations, which established that "Daimler-Benz used its marks in Texas to create recognition for itself as part of a system of marketing its vehicles in Texas." Pet. App. 15a-16a. It also observed that Daimler-Benz's allegations "necessarily implied that it has engaged in competition and has established business relationships and business operations in Texas." *Id.*

Recognizing that its admissions are fatal to its case against personal jurisdiction, Daimler-Benz strives mightily to convince this Court that the allegations do not mean what they plainly say. For example, it argues that the allegation that Daimler-Benz used its marks throughout Texas does not mean that Daimler-Benz itself used the marks, but only that MBNA used them under license. This argument is contrary to the plain language of the complaint. Not only does the complaint clearly state that "Daimler-Benz . . . used" its marks throughout Texas, but it goes on to state that MBNA also used them continuously "pursuant to license by Daimler-Benz . . . for the same purposes as Daimler-Benz." Furthermore, if the term "Daimler-Benz" in the complaint had been intended only as a reference to MBNA, it would have been superfluous to say that MBNA had used the marks under license from and for the same purposes as Daimler-Benz. The allegation of trademark use in Texas by "Daimler-Benz" therefore must be taken at face value.

Finally, Daimler-Benz argues that general allegations a trademark plaintiff must make cannot be allowed to support personal jurisdiction over the plaintiff in the forum where the infringement occurred because this jurisdictional consequence would impermissibly burden the exercise of federal trademark rights. But Daimler-Benz went well beyond the general allegations necessary. Instead, Daimler-Benz made broad, unnecessary allegations about its *own* use of the trademarks in Texas and its own expenditures promoting and advertising the trademarks in Texas. Moreover, Daimler-Benz separately incorporated its admissions into each of three causes of action Daimler-Benz brought under Texas state law: trademark infringement under Texas common law; unfair competition under Texas common law; and dilution of marks and injury to business reputation under TEX. BUS. & COM. CODE ANN. § 16.29 (Vernon Supp. 2002). *See* Pet. App. 64a-65a. As the court of appeals recognized, it is only fair to hold Daimler-Benz to those allegations in light of "the policy that a party should not be allowed to prevail on its assertions after clearly negating those assertions before a judicial tribunal." Pet. App. 15a.

For these reasons, the petitioner's reliance on *Felder v. Casey*, 487 U.S. 131 (1988), is misplaced. *See* Pet. 26-27. The real issue here is about overly-broad assertions constituting judicial admissions under state law. As such, if there is any penalty imposed on Daimler-Benz, it comes from the petitioner's own mouth, and not from an abuse of trademark law. The court of appeals' reliance upon Daimler-Benz's admissions does not conflict with any of the cases cited. *See* Pet. 18.

The unusual factual posture of this case, created by Daimler-Benz's judicial admissions, makes this a poor vehicle for addressing federal issues of personal jurisdiction. Litigants have no need to make such broad trademark assertions, and in this context, the issue is not likely to recur often. Such a highly unusual case is not worthy of the Court's attention.

F. The Attribution of MBNA's Texas Contacts to Daimler-Benz Is Not an Issue Deserving of this Court's Attention.

As Daimler-Benz acknowledges, the court of appeals recognized the "traditional principle" that a "foreign parent company [may] 'be considered to be doing business through the local activities of its subsidiaries' " when " 'the parent corporation exerts *such dominance and control* over its subsidiary that the subsidiary is *simply a conduit* through which the parent conducts its business' – a 'degree of control' that is 'greater than that normally associated with common ownership and directorship.' " Pet. 18-19 (quoting the court of appeals' opinion, Pet. App. 16a) (emphasis petitioner's). Nonetheless, Daimler-Benz accuses the court of appeals of applying a different standard of "whether MBNA is in fact a mere 'division' or 'branch' of a larger whole." Pet. 19. This is just semantics. The court of appeals included the "division or branch" quote in a footnote citing *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 425-26 (9th Cir. 1977). As Daimler-Benz recognizes, after stating the "mere division or branch" standard, the *Wells Fargo* court actually applied the same test that Daimler-Benz argues should be applied. *See Wells Fargo*, 556 F.2d at 425-26. The court of

appeals followed exactly the same standard. Pet. App. 16a-17a. Placing the "mere 'division' or 'branch' " quote in a footnote is inconsequential. In text, the court of appeals recited, and accepted, the very principles Daimler-Benz says it should have applied. *See* Pet. App. 16a-17a.

Daimler-Benz admits that the court of appeals "acknowledged" the "traditional principles." Pet. 19. Daimler-Benz's complaint is merely that the court of appeals did not correctly apply the facts of this case to the legal principles it "acknowledged." *Id.* We dispute Daimler-Benz's assertions that the record does not support the imputation of MBNA's substantial Texas contacts to its parent, Daimler-Benz, under traditional legal principles. *See* pp. 11-12, above. Regardless, Daimler-Benz's fact-bound complaint about the application of settled law to particular facts does not merit this Court's review. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Additionally, because Daimler-Benz did not raise the issue below, this case does not present an effective vehicle for deciding the continuing validity or scope of this Court's decision in *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925). While Daimler-Benz now suggests that there are two lines of cases, one applying the *Cannon* rule and another applying "more lenient" alter ego principles, Pet. 20, Daimler-Benz made no such argument below. To the contrary, Daimler-Benz cited *Cannon* while telling the court of appeals that "in order to impute the contacts of Daimler-Benz AG's subsidiaries to the parent, plaintiffs have the burden of establishing the

same degree of control by Daimler-Benz AG over those subsidiaries as would be required to disregard the corporate form under the alter ego doctrine." *See* Brief of Appellant at 29.

The court of appeals applied traditional alter ego principles because Daimler-Benz told the court of appeals to do so. Only now, having lost under those principles, does Daimler-Benz assert that *Cannon* requires a different analysis. If this Court is interested in clarifying *Cannon*, it should wait for a case in which the issue has been raised, argued, and decided below.

G. This Case Provides a Poor Vehicle for Resolving Any Conflict Regarding Fair Play Factors.

Daimler-Benz also posits an alleged conflict among the courts regarding which factors to consider in deciding the fair play and substantial justice prong of the personal jurisdiction inquiry. Pet. 23. But again, Daimler-Benz failed to raise this issue below. *See* Brief of Appellant at 40-41. Daimler-Benz never argued that the factors considered by the Texas courts violated due process, were incorrect or insufficient, or were in conflict with the factors utilized by other courts. *Id.* Daimler-Benz embraced the factors actually utilized by the court of appeals, identifying them to the court as "the relevant factors." *Id.* at 41. Indeed, the lower court applied the same factors this Court discussed in *Burger King Corporation v. Rudzewicz*, 471 U.S. 462, 477 (1985). Pet. App. 26a.

Daimler-Benz's failure to have raised these arguments below makes this case a particularly poor vehicle

for resolving any conflict or for determining which factors *ought* to be utilized. Those issues were not developed by the parties and were not addressed by the courts below. Daimler-Benz still has not taken a position on what factors should be utilized, and there is no way to tell whether the record in this case will be adequate to address the issues.

III.

For the reasons we argue above, this petition should be dismissed or denied because the case is cluttered with obstacles. There is no assurance the Court can reach the issues raised. Yet even if this Court determines that it has jurisdiction over this interlocutory appeal, and that all the obstacles and factual disputes can be overcome, there is no compelling reason why the merits of the case deserve the Court's attention.

A. Daimler-Benz Has Significant Purposeful Contacts with Texas.

Daimler-Benz has multiple contacts with Texas that make it entirely consistent with due process to subject it to personal jurisdiction. Daimler-Benz stipulated that it designs and manufactures cars for the United States and specifically Texas. Pet. App. 53a. The cause of action accrued in Temple, Texas, where the accident happened. *Id.* Daimler-Benz has created and controls a distribution system for bringing vehicles to Texas. Pet. App. 55a-56a; 76a-93a. Daimler-Benz delivers thousands of vehicles annually into the stream of commerce intended for Texas. CR 1198-1206; 1215-99. Daimler-Benz has judicially

admitted its long-standing and extensive trademark usage and advertising in Texas, which it sought to defend under both federal *and* Texas law. Pet. App. 14a-16a. By making these judicial admissions, Daimler-Benz admitted that it has directed its commercial efforts towards Texas on a systematic and widespread basis. In addition, Daimler-Benz has set up an interactive website to provide information and advice to Texas residents. Pet. App. 57a, 24a-26a.

B. Daimler-Benz Could Have Anticipated Being Sued in Texas for an Accident in Texas.

As a result of purposefully directing its commercial activities toward Texas residents in these ways, Daimler-Benz could and did reasonably anticipate that its activities would subject it to suit in Texas. Daimler-Benz anticipated well before this case that it might be subject to vehicle products liability suits in Texas because of its Texas-directed activities. Indeed, both Daimler-Benz and MBNA were defendants in a products liability lawsuit filed in Texas at some time prior to October 1994, and Daimler-Benz did not object to that court's exercising personal jurisdiction over it. *See Baker v. Mercedes Benz of N. Am.*, 114 F.3d 57 (5th Cir. 1997); CR 150.[2] Daimler-Benz responded not by severing its ties to Texas, but by procuring general liability (including products liability)

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[2] In reply to respondents' interrogatory asking Daimler-Benz to identify any post-1985 suits against it in the United States in which it objected to personal jurisdiction, Daimler-Benz neglected to list the *Baker* case. It stated that "during the relevant time period,. . . . [t]here are no other such suits." CR 150.

insurance for claims made against it in Texas and elsewhere. CR 1512; Pet. App. 58a.

Under these circumstances, Daimler-Benz reasonably anticipated in 1996 that another vehicle products liability lawsuit might be filed against it in Texas, particularly if – as here – the accident occurred in Texas and the suit concerned a product defect that was present in at least some of the vehicle models it designed and manufactured for the Texas market and intended for sale in Texas. *See* Mary Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610, 660-62 (1988) (concluding that similar facts support personal jurisdiction over manufacturer because it will have foreseen and insured against suits); *accord* Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 HARV. L. REV. 1444, 1457 (1988) ("[W]hen substantively relevant activities occur within the forum, the forum has an interest in adjudicating their consequences."). Daimler-Benz can be haled into court in Texas because it has consciously chosen to have wide and systematic contacts with Texas, and the lawsuit is related to those contacts – involving gas-tank defects in its cars.[3]

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[3] Daimler-Benz has always known this case was about fire-causing defects in the gas tanks on its cars, and it had every opportunity to offer evidence below that none of its U.S.-market vehicles had such defects. It chose not to do so. Indeed, at the special appearance hearing, when the Olsons argued that the fire was caused by a defective gas tank and "there's no evidence whatsoever that the gas tank on this car was any different than the gas tanks that they sent to America," RR 63, Daimler-Benz did not deny it. Given Daimler-Benz's burden to speak up, it must be presumed that other gas tanks on the vehicle models it admittedly designed for the U.S. and Texas markets have similar defects.

"The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.' " *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). When Daimler-Benz *chooses* the Texas market as a place of doing business, and when it admits to the "inestimable good will" it has derived from the Texas market, where it judicially admitted to being present "in commerce," fair play should condone a products liability lawsuit against Daimler-Benz in that forum, where the accident occurred. Jurisdiction exists here precisely because of a "relationship among the defendant, the forum, and the litigation." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)). For all these reasons, the result below is correct.

CONCLUSION

The petition should be dismissed or denied.

Respectfully submitted,

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